No. 1369

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

VAN GESNER,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

MARION R. BIGGS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

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FRANK D. MONCKTON, Clerk.
By.....Deputy Clerk.

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ADMISSION OF EVIDENCE.

The plaintiffs in error contend that the trial Court committed errors in the admission of evidence,

but in discussing these errors in their brief they have failed to point out the pages of the record upon which these alleged errors can be found, and we think that this is sufficient reason for the Court to decline to pay any attention to them. It is certainly not the duty of the Court to search through voluminous records to discover whether or not the errors assigned by the plaintiffs in error actually exist.

As a matter of fact, however, the plaintiffs in error did not in a single one of the alleged errors of admission of evidence assigned in their brief, make a sufficient objection to the admission of the evidence, or save an exception to the ruling of the Court thereon.

It was our original intention to ignore these assignments of error, for the reason stated, but we have concluded that it is perhaps our duty to aid the Court by pointing out specifically the place in the record where these respective alleged errors can be found, and by calling its attention to the absence of the proper objections and exceptions as shown thereby.

As the plaintiffs in error enumerate and specify one hundred and thirty-nine alleged errors as being relied upon by them, we will not undertake to point out where all of them can be found in the record, but will confine ourselves to those which the attorneys for plaintiffs in error have considered of sufficient importance to present argument upon.

Their argument of these assignments of alleged error as to admission of evidence, commences on page 86 of their brief.

POINT I.

The evidence in relation to the first assignment of alleged error is found in Volume II of the Transcript of the Record, at page 545. The attorneys for plaintiffs in error purport to quote from the record. The questions and answers of the witness Christian Feuerhelm are found at that place. After correctly quoting the questions and answers, the attorneys for plaintiffs in error inject into their brief, between the last question and answer, the following matter which is not contained in the record, to wit: "to " which the defendants objected as incompetent and " immaterial, calling for a conclusion of the wit- " ness and not binding upon the defendants, but the " objection was overruled and the defendants ex- " cepted, and the witness answered." An examination of the record at page 545 discloses the fact that no objection whatever was made, and necessarily no ruling was made and no exception whatever was or could have been saved.

It is only fair to call the attention of the Court to the fact that in Volume II of the Transcript of Record, at pages 515 and 516, the attorneys for plaintiffs in error, have inserted in the bill of exceptions a statement which does contain an alleged objection and exception such as they set forth in

their brief. Immediately following it, however, is this statement, to wit: "The following is all of the "testimony of the aforesaid witness, Christian "Feuerhelm, introduced at the trial: September "13, 1905. CHRISTIAN FEUERHELM, witness called "on behalf of the Government, being duly sworn, "testified as follows:

Then follows the complete record of the proceedings which were actually had in the Court, and at page 545 the questions and answers appear upon which the plaintiffs in error predicate their assignment of error. It is apparent that the aforesaid statement at pages 515 and 516 crept into the record without being noticed by the attorneys for defendants in error, or by the trial judge. It would be unfair to the trial Court and would certainly not be in the interest of justice to permit objections and exceptions that were never taken at and during the trial, to be inserted in the record at the time of the settlement of the bill of exceptions, as to the admission or rejection of evidence. The purpose of requiring an objection to be made, and an exception to be saved, is to enable the trial Court to then and there correct the error, if any has been committed, by having its attention specifically directed to the same, to the end that long and expensive trials shall not be had to no purpose.

In this particular instance, the answer of the witness was in no way prejudicial to the plaintiffs in error, because the witness in effect stated that he

believed nothing except what he had already testified to as having occurred. This was not in any way an expression of his opinion, conclusion or understanding of the meaning of anything said or any act done by any other person.

The objection and exception even if it was permitted to be inserted in the Bill of Exceptions with the knowledge of the Court, were made too late. See

> *Thiede v. Utah Territory,* 156 U. S. 510, and *Mich. Ins. Bk. v. Eldred,* 143 U. S. 293.

POINT II.

The next witness is Joel E. Calavan, and the testimony about which plaintiffs in error complain, commences at the bottom of page 356, Volume 1 of the Transcript of the Record.

The record is correctly quoted in the brief of plaintiffs in error, at page 87 thereof, down to and including the question, "Q. Was anything said " about why he wanted the claim filed on? A. Why, " I think he told me that he wanted to protect his " range from other stock men." This question and answer appear at the bottom of page 357 of the record. Plaintiffs in error say at bottom of page 87 of their brief, "he was then asked this question: " 'What was your understanding at the time as to " what the terms were on which you were taking " it up?' to which the defendant objected as calling

" for a conclusion of the witness, and incompetent " and not binding on the defendant in any way, but " the objection was overruled and the witness ans- " wered: 'Why I understood that I was to receive " $500 for the claim when the patent issued.' "

As a matter of fact the aforesaid question to which objection was made by plaintiffs in error, did not immediately follow the last question and answer quoted by plaintiffs in error at the bottom of page 87 of their brief. On the contrary, an entire page of questions and answers intervene, to wit: page 358 of the Transcript of Record. The question, " What was your understanding at the time as to " what the terms were upon which you were taking " it up", and the objection and the aforesaid answer appear at the middle of page 359 of the Transcript of Record.

It should be noticed that the plaintiffs in error did not save any exception to the ruling of the Court upon their objection to this question. Had they done so it must be presumed upon this appeal that the trial Court would have then and there corrected the error, if it is error. As a matter of fact, as we will presently endeavor to demonstrate, it was not error, because the evidence was offered for the purpose of proving that perjury was then and there committed by the entryman, Joel E. Calavan, before the Defendant Biggs, who was a United States Court Commissioner, and who was then examining Calavan upon his final proof. It is contended by

defendants in error that it was competent for them to prove that the entryman committed perjury as an overt act, in furtherance and in consummation of the object of the conspiracy between the defendants, Biggs, Gesner and Williamson to suborn a large number of persons, including said Calavan, to commit perjury. The fact that perjury was committed by the entrymen is a circumstance which may be taken into consideration by the jury with all the other circumstances in evidence, in determining whether or not the defendants did conspire together to suborn a large number of persons to commit perjury, as alleged in the indictment. It was material to determine what understanding the entrymen had, at the time he was making his final proof, as to what he had agreed to do with the land, as soon as he obtained the title thereto, in order to determine whether or not he was then swearing falsely in stating that he was not purchasing the land for speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which, the title he might acquire from the Government of the United States would inure, in whole or in part, to the benefit of any person except himself.

The evidence was not offered for the purpose of proving what the agreement was, if any, between the entryman Calavan and the defendants, nor as sub-

stantive evidence of what that agreement was, but it was offered solely for the purpose of proving that the entryman Calavan did not believe that the statements were true which he was then making under oath before said defendant Biggs, as United States Commissioner. In other words, it is contended by defendants in error, that upon the trial of defendants under an indictment for conspiracy to suborn a large number of persons to commit perjury, it is competent to prove that a large number of perjuries were committed by persons who were acting at the suggestion of defendants, and who were thus aiding defendants to accomplish the object which was the motive for the conspiracy of defendants. The proof of these perjuries, however, would be merely for the purpose of establishing them as facts in a chain of circumstantial evidence, and as thus tending and aiding to prove the existence of the unlawful agreement among the defendants to procure the commission of that perjury. The jury were properly instructed that they could not convict the defendants unless they believed beyond a reasonable doubt that the defendants knowingly, corruptly and wilfully procured the respective entrymen to knowingly and wilfully commit perjury.

POINT III.

The next witness whose testimony is attacked is Wilford J. Crain. See page 88 of brief of plaintiffs

in error. That part of the testimony of the witness Crain, upon which the assignment of errors is based, appears in Volume 1 of the Transcript of Record, at page 395.

The record covering the questions asked of this witness, which are quoted on pages 88 and 89 of the brief of plaintiffs in error, reads as follows:

"Q. What was your understanding as to whether
" you had promised to do that or not?

"Mr. BENNETT: We object to that, your Honor.
" Let him state the facts.

"Mr. HENEY: This goes to the question of his
" BELIEF at the time he made this.

"The COURT: He may state his belief.

"Mr. BENNETT: We object to it as incompetent,
" immaterial and not in any way binding on the de-
" fendants.

"Q. Did you believe you were obligated?

"Mr. BENNETT: That is objected to as leading.

"Q. Well, what did you believe?

"A. You mean, do I believe I was under obliga-
" tion to let them have it?

" Q. Yes.

"A. Well, I would have felt that way if I had
" went ahead and proved up on the land and they
" had furnished me the money to do it with.

"Q. Was that your understanding of it?

"A. Yes, sir.

"(Objected to as being leading and calling for
" the understanding of the witness.)"

The witness had just been shown the written statement in duplicate, or "sworn statement" so called, which he had signed and sworn to before the defendant Biggs, as United States Commissioner, when he filed upon the land described therein at the instance and suggestion of the defendants. He had also testified to the agreement which he had made with the defendants through their agent Watkins, his father-in-law. The Government was again endeavoring to prove that the entryman had actually and wilfully committed perjury in applying for the land. The statement by Mr. Heney that "this goes " to the question of his belief at the time he made " this," and the Court's reply that "he may state his belief," shows clearly that the testimony was not offered for the purpose of proving what the agreement, if any, between the entryman and the defendants was, but that it was offered only for the purpose of proving that the entryman did not believe that the statements were true which he had then and there sworn to before said defendant Biggs, as United States Commissioner.

Again it will be noticed that the question "what " was your understanding as to whether you had " promised to do that or not" was left unanswered by the witness, and that to the question, "Well, what did you believe"? there was no objection whatever made by plaintiffs in error, and that to the final question, "Was that your understanding of it", there was no objection made by plaintiffs in

error until after the witness had answered "yes, sir". The only objection made at that time was that the question was "leading and calling for the un- " derstanding of the witness". There was no objection on the ground that it was incompetent, immaterial or irrelevant. There was no motion made to strike out the answer of the witness, and there was no exception saved to the ruling of the Court upon the objection, and as a matter of fact the record shows that the Court did not rule upon the objection at all, for the evident reason that the objection was made too late, because it was made after the witness had answered.

POINT IV.

The next witness against whose testimony error is assigned, is Henry Hudson. See page 89, Brief of plaintiffs in error.

All that is called to the attention of the Court, in regard to the witness Hudson, is the following:

"So the question was asked of witness Hudson:

"Q. What did you understand at that particular " time as to whether you had agreed to sell it to " Gesner or not?"

There is no suggestion or pretense that the witness Hudson was permitted to answer the question, or that he did answer the question, or that the plaintiffs in error made any objection to the question, or that the Court made any ruling upon the same, or

that they saved any exception to any ruling of the Court upon the same. It is not even pointed out in their brief where this question can be found in the record. The aforesaid question appears in Volume 1 of the Transcript of Record, at page 473, and the record reads as follows:

"Q. What did you understand at that particular "time as to whether you had agreed to sell it to "Gesner or not?

"Mr. BENNETT: We object to that, your Honor.

"(Objection overruled. Defendants except.)

"A. Well, now, I don't know. It was kind of "an agreement; a verbal one, though."

It will be noticed that plaintiffs in error did not state any ground for their objection in this instance, and consequently the objection is totally insufficient. In this instance they did save an exception to the ruling of the Court.

This evidence was offered for the same limited purpose before stated, to wit: to prove that the entryman Hudson committed perjury at the time he signed the written statement in duplicate, or "sworn statement" so called, and swore to the truth of the same before defendant Biggs as United States Commissioner for the purpose of filing upon the land described therein at the instance and suggestion of the defendants, and to aid them in the object which was the motive for their conspiracy to suborn persons to commit perjury.

This witness had previously testified to his conversation with Gesner, in relation to the filing, which constituted an agreement to sell the land to Gesner as soon as he obtained title thereto from the government, according to the contention of defendants in error. He had just previously testified that he took the land up "for speculation". (See middle of page 473, Transcript of Record.)

POINT V.

The next witness, a portion of whose testimony is assigned as error, is Ben Jones, (See Brief of plaintiffs in error, pages 94 and 95). The aforesaid testimony of the witness Jones, which is so quoted in the brief, is found in Volume 1 of Transcript of Record, commencing on page 170.

The record, including two questions and answers immediately preceding the first one quoted by plaintiffs in error in their brief on page 94 thereof, is as follows, to wit:

"Q. Mr. Jones, at the time you signed this appli-
" cation were you sworn by Mr. Biggs?

"A. Yes, sir.

"Q. Was this paper read to you?

"A. I think it was.

"Q. Now, at the time you signed it and swore to
" it, did you intend to convey this land to Dr. Ges-
" ner for the consideration named by him to you,
" as testified by you, as soon as you obtained the title
" thereto?

"Mr. Bennett: Now, may it please your Honor, "we desire to object to that upon the ground that "the intention of this witness is not binding in "any way upon the defendants.

"The Court: The witness may testify to all the "acts, all the conversations and the circumstances, "and he may also testify to his intention, if it be "a material element involved.

"(Defendants except to the ruling.)

"A. Yes, sir.

"Q. What was your belief at the time you signed "and swore to this, as to whether or not this state- "ment in the paper was true: 'I do not apply to "purchase the land above described on speculation, "but in good faith to appropriate it to my own ex- "clusive use and benefit, and that I have not, di- "rectly or indirectly made any agreement or con- "tract in any way or manner, with any person or "persons whomsoever, by which the title I may "acquire from the Government of the United States, "may inure, in whole or in part, to the benefit of "any person except myself'?

"A. Well, if I had got the $75, it would have been "for my benefit, wouldn't it?

"Q. The $75 would have been, yes.

"A. Yes.

"Q. But what was your belief as to whether the "purpose with which you were taking the land was "to have the land for your own special use and bene- "fit?

"A. Well, I had agreed to have taken that from
" Gesner, of course; I admit that; that I did agree
" to take it from him.

"Q. Then you knew at the time that this state-
" ment wasn't true?

" A. Yes, sir."

The last four questions and answers are very appropriately omitted from their brief by counsel for plaintiffs in error. The witness Jones was the first witness called for the prosecution, upon the trial of the case at bar, and these questions and answers clearly and unequivocally establish the purpose of the testimony, to wit: that it was exclusively for the purpose of establishing the fact that the entryman Jones knew that he was swearing falsely at the time he signed and swore to his application to purchase the land before the defendant Biggs, United States Commissioner, at the instance and suggestion of defendant Gesner, and that the entryman Jones was committing this perjury for the purpose of, and with the intent of, aiding the defendants to accomplish the object which was the motive for them to suborn a large number of witnesses, including Jones, to commit such perjury, to wit, in order, as we shall presently more fully see, to enable Gesner and Williamson to protect their summer sheep range against encroachment of other persons in the same business.

It is apparent from the testimony quoted, that it was not offered as tending to prove, or for the purpose of proving, the existence of a contract between

the entryman Jones and the defendants, or either of them, by which the defendants had agreed to purchase the land, and by which Jones had agreed to convey it to them as soon as he secured title. The witness had previously testified that Dr. Gesner, in June, 1902, in Prineville, had told the witness that if he and his wife would go up there and take a claim near the clipping corrals on the Wickiup, near the Horse Heaven country, that Gesner would give them $75 a piece, when they proved up, and that witness told Gesner that he would see his wife about it, and that after seeing his wife he told Gesner that they would go ahead, and that Gesner told them what day to go up there, and that there would be others going up, and that the witness and his wife and their little boy and Joel Calavan and his wife, went up together in a hack or rig of their own, sometime in the last days of June, and that when they reached the shearing plant, which is known as the Williamson and Gesner shearing plant they found Gesner there with others, and that Gesner spoke to him about which land he was to file upon, and told him where to go to see it.

Two or three days afterwards he went before Biggs, and that Biggs had the description, he thought either Biggs or Gesner; that he filed upon it. He then identified the filing papers, and they were offered and admitted in evidence. (See Volume 1 of the Transcript of Record, pages 163 to 170, both inclusive.) Then follows the testimony hereinbefore quoted.

It will be noticed that the only objection made to the question, "Now, at the time you signed it and " swore to it, did you intend to convey this land to " to Dr. Gesner for the consideration named by him " to you, as testified by you, as soon as you obtained " the title thereto?" by plaintiff in error is as follows: "We desire to object to that upon the ground " that the intention of this witness is not binding in " any way upon the defendants". It may safely be conceded that the intention of the witness in that matter was not binding in any way upon the defendants. But it does not necessarily follow that the testimony was not competent, material or relevant. It was not objected to upon the ground that it was incompetent, or that it was immaterial, or that it was irrelevant, and no reason was specified to the Court as to why it was incompetent, or immaterial, or irrelevant. In reply to the objection, the Court said: " The witness may testify to his intention, if it be a " material element involved." If the intention of the witness was not a material element involved in the issues then being tried, it was the duty of counsel for plaintiffs in error, to point out to the Court the reason why it was not material.

The foregoing quoted testimony demonstrates the theory upon which the trial Court admitted the testimony of the various witnesses hereinbefore discussed as to their understanding and intention, at the time they were making their applications and their final proof respectively, as to what they had agreed to

do, or would do with the land as soon as they acquired title to the same.

It must be remembered that Jones was the first witness for the prosecution, and that the theory upon which the case was being tried was completely and fully exposed in the taking of his testimony, and thereafter the Court's rulings were made, in accordance with said theory.

The only other assignment of error made by counsel for plaintiffs in error, in relation to the testimony of the witness Jones, is as follows:

"Again, in relation to the final proof, the witness " was asked:

" 'Q. Mr. Jones, at the time that you subscribed " this final proof paper, what was your intention " with reference to this land as to what you would " do with it when you obtained the title?' and was " permitted to answer: 'A. Let Gesner have " it'."

It will be noticed that counsel do not put in their brief, the objection which they made to the question. Said question and answer appear in Volume 1, Transcript of Record, at page 183, but in order to understand the position of the trial Court, it is necessary to consider the testimony which immediately preceded that question and answer.

Commencing at bottom of page 180, Volume 1, Transcript of Records, it reads as follows:

"Q. At the time that you made this final proof,

" Mr. Jones, did Mr. Biggs say anything to you " about the making of a note or mortgage?

" A. No, sir.

" Q. Do you remember any conversation as to " whether you were to make one at that time?

" A. No, sir. I was not to make any.

"Q. You weren't to make one. But do you re- " call any conversation about it with Biggs?

"A. I don't remember about any with Biggs.

"Q. Do you remember having one with anyone " else?

"A. Why, I and Gesner talked about the money " proposition as far as that is concerned.

"Q. When?

"A. At the time I was to file on the timber. He " was to furnish the money.

"Q. What did he say about that?

" A. Well, he said he would furnish me the " money.

"Q. And how about your wife?

" A. He would furnish her.

"Q. Was that in the same talk where he said he " would pay the $75.

"A. Yes, I think it was.

"Q. Now, at the time you made this final proof " what was your intention as to what you would do " with the land when you got title to it?

" (Same objection.)

" COURT: It goes in subject to the same objec- " tion. I understand the objection to apply to this " question also.

" Mr. BENNETT: I think this is a little different " from the other, your Honor. It goes to the matter " of what his intention was at the time of the mak- " ing of final proof, and it may be that it depends " upon that other question that has been holding " back so that we would have some chance to pre- " sent the authorities to your Honor.

"COURT: Mr. Heney, do you contend that even if " the construction must be put upon the indictment " that the conspiracy charged was only on making " that application to enter, that this would still be " admissible testimony?

" Mr. HENEY: I believe that it would be, if your " Honor pleases, as tending to throw some light " upon the question as to what the intent of the " party was at the time the original entry was made; " that it is a part of the res gestae of the trans- " action. If perjury was suborned for the original " statement, the purpose of it was to secure title " to the land for Gesner, and that anything done " that could have been in contemplation of the " parties at the time is necessary to be done in order " to complete that purpose would be a part of the " transaction, which would be competent evidence to " show the intent with which the other part was " done.

"The COURT: I am inclined to think that that is " the correct rule; on general principles I think that " would be the correct view to take of it; unless " there is some rule that would be different appli- " cable to this particular charge, I should so hold.

" Mr. BENNETT: I had supposed that the decision " of Judge De Haven in the matter had become the " law of the case in all these questions, whether " favorable or unfavorable, and therefore, I am " not prepared at this time to present this matter " carefully.

" (Argument.)

" (Objection overruled. Defendants except.)

" Q. Mr. Jones, at the time that you subscribed " this final proof paper, what was your intention " with reference to this land as to what you would " do with it when you obtained the title?

" (Same objection. Objection overruled. De- " fendants except.

"A. Let Gesner have it.

"Q. Under that agreement?

"A. Yes, sir.

"Q. After you had made your final proof, did you " receive money back from the land office?

"A. Yes, sir; checks.

"Q. One for yourself and one for your wife?

"A. Yes, sir.

"Q. Are these the checks and is that your signa- " ture on one of them and here on the other?

"A. This is mine and this is hers.

"Q. Did you receive a letter with those?

"A. I couldn't say. I don't believe I did.

"Q. You don't remember what you did with it " if you had one?

A. No. I don't remember. There might have been

" a note in there with it from the land office. I " believe there was.

"Q. Yes. I mean from the land office?

"A. Yes, sir.

"Q. These came to you from the land office by " mail?

"A. Yes, sir.

"Q. What did you do with them when you got " them?

"Q. (JUROR.) From the land office at The Dalles?

" Mr. HENEY: Yes. The date of this is January " 25, 1904. Both of these checks.

"Q. At the time these were returned to you had " you given any indication to the land office or land " officers, in any way, that you did not desire to go " ahead with that entry?

"A. At that time?

"Q. Yes.

"A. No, I had not.

"Q. Now, then, you received these from the land " office?

"A. Yes, sir.

"Q. And what did you do with them when you " got them?

"A. I put them in the bank there at Prineville, " the First National Bank, to Gesner's credit.

"Q. Did you see him before doing so? Talk with " him any?

"A. I don't remember whether I did or not, now.

"Mr. HENEY: We will offer these two checks in

" evidence. That is the amount paid to the land " office, $411 on each check, and it is a check of " Anne M. Lange as receiver of the land office at " The Dalles, payable, the first one to B. F. Jones, " endorsed B. F. Jones, and there are several banks' " stamps on there.

"(Marked Plaintiff's Exhibit No. 5.)

"Mr. HENEY: The second one is the same way, " 'Pay to Nancy D. Jones.' Same date, January " 25, 1904, $411. Anne M. Lange, Receiver. En- " dorsed, Nancy D. Jones.

"(Marked Plaintiff's Exhibit No. 6.)

"Q. Have you done anything further with refer- " ence to the land since?

"A. No, sir.

"Q. Have you received a patent for it yet?

"A. No, sir."

It will be noticed that the only objection made by the defendants to the question in controversy is in the following language: "Same objection". It is impossible to tell what counsel for plaintiffs in error mean by these words, because his next preceding objection was in exactly the same language (See Transcript page 181), and his next objection preceding the one on page 181 is found at the bottom of page 174, and is as follows: "We object to that on " the part of each of the defendants as incompetent " (objection withdrawn)." And the next objection preceding that is on page 173, and is as follows: " Our objection goes to that", and the next objec-

tion preceding that is at the top of page 173 and is as follows: "Same objection. I suppose our ob- " jection may go to all of this." The next objection preceding that is on page 172, and is as follows: "Objected to as incompetent, immaterial and hear- " say". This last objection was directed toward a " question as to a statement made by the witness " Jones to his wife, at the request of Gesner, to the " effect that Gesner wanted her to file on a piece of land, and that Gesner would furnish the money and pay her $75 for doing so. It is evident that no sufficient objection was made to the question assigned as error, on page 95 of the brief of counsel for plaintiffs in error. Moreover, it must be apparent that the testimony was not offered for the purpose of proving or tending to prove that a contract for the sale of the land existed between Jones and Gesner. On the contrary, it was offered solely for the purpose of showing that Jones wilfully and knowingly swore falsely in making his final proof.

At page 182, Transcript of Record, Mr. Bennett, of counsel for plaintiffs in error, says: "It goes to " the matter of what his intention was at the time " of the making of final proof, and it may be that " it depends upon that other question that has been " holding back so that we would have some chance " to present the authorities to your Honor." By that sentence Mr. Bennett meant the question as to whether or not perjury could be based upon false swearing at the time of final proof, in answer to

questions propounded by the General Land Office, for the purpose of determining whether or not the applicant was desiring to purchase the land for speculation, or whether it was being purchased in good faith by him to be appropriated to his own exclusive use and benefit, and whether he has directly or indirectly made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the title which he might acquire from the Government in and to such land, should inure in whole or in part to the benefit of any person except himself. It was contended by plaintiffs in error that this false swearing at the time of final proof in regard to those questions, did not constitute perjury, because the Timber and Stone Act did not expressly and specifically require the applicant to give such testimony at that time; whereas it was contended by defendants in error that it did constitute perjury, because the rules and regulations of the land department required the applicant to answer those questions at that time, in order to enable the department to determine whether or not he was endeavoring in good faith to purchase the land for his own exclusive use and benefit, and not for speculation.

The issuance of the final receipt to all these lands was delayed because, after the majority of the filings had been made, the General Land Office discovered that enumerable frauds were being committed in the State of Oregon and elsewhere, and the

Secretary of the Interior caused all applications to be suspended, where the final proof was made before some officer other than the Register and Receiver, until an agent of the Land Office could first visit the applicant and cross-examine him, in regard to the bona fides of his purchase; that is to say, in regard to whether he was endeavoring to purchase the land for speculation or for the use and benefit of another. Finding that it would take considerable time to accomplish this, a general order was issued for the return of his purchase money to each applicant whose application to purchase was under suspenion. If no suspension order had taken place, and Jones had promptly received his final receipt, after making final proof, and had immediately thereafter conveyed the land by good and sufficient deed to the defendant Gesner, and had received in consideration of such deed the sum of $75, it could hardly be doubted that, under this indictment, it would have been proper to prove all these facts as part of a chain of circumstantial evidence tending to prove the existence of the conspiracy alleged in the indictment.

But, if it would be proper to prove that Jones actually conveyed the land to Gesner as soon as he received his final receipt, it is difficult to understand why it would not be equally proper to prove that, at the time he made his final proof, it was his intention to convey the land to Gesner just as soon as he secured his final receipt, because the fact that he en-

tertained the intention of making the conveyance at the very time of making final proof is a slightly higher degree of evidence as a link in such a circumstantial chain than the actual conveyance itself immediately after securing the final receipt would be. This is true for the reason that immediately after he had secured his final receipt he would have the lawful right to sell and convey the land. Moreover, proof that he did convey the land immediately after obtaining his final receipt would be important as evidence only because the inference could properly be drawn therefrom that he entertained the intention of makig such conveyance at or before the time he made his final proof. Consequently, the direct testimony of Jones as to what his intention was in this respect, at the time of making final proof, is a higher degree of evidence.

In *White v. State,* 53 Indiana, 596, the Court said:

> "Because the intention is a fact which cannot in the nature of things be definitely known to others, and is hence a matter about which other witnesses cannot directly testify, does not in our opinion affect the rule that it is admissible."

In *Holmes v. Goldsmith,* 147 U. S. at page 164, the Supreme Court says:

> "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be.

'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.'

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

In the case of *People v. Bentley,* 75 Cal. at page 409, the Court says:

"A conspiracy, like most other facts, may be proved by circumstantial evidence. Indeed, it is not often that the direct facts of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main central object, and tending to convince the mind reasonably and logically of the existence of the conspiracy.

"In the language of Greenleaf: 'If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.' (3 Greenl. Ev., sec. 93; United States vs. Doyle, 6 Saw. 612.)"

In *Brown v. United States,* 142 Federal Reporter, 1, decided August 1, 1905, the defendant on trial, was charged with aiding and abetting an officer of a national bank, in the misapplication of bank funds by lending the same to an insolvent corporation, of which defendant was president, and it was held that evidence that such officer of the bank, Broderick, also lent money of the bank to other insolvent corporations is admissible, as tending to show his intention in making the loans charged.

It would clearly have been equally proper to have proven the intention of the bank officer by his own testimony. It cannot be possible that the mere inference to be drawn from similar acts performed by him is a higher degree of evidence than his own direct testimony under oath, as to what his intention was. In this case, the bank officer was not on trial, and evidence of the intention which he had in withdrawing the money from the bank was admitted as against the defendant, as tending to prove the charge that the defendant aided and abetted said bank officer in the misapplication of the bank funds by lending the money to an insolvent corporation of which the defendant was president.

In the case at bar, each applicant, as shown by the testimony, was an accomplice of the defendant in the commission of the crime of perjury, and, likewise, in a conspiracy to defraud the government of the United States out of a certain proportion of its public lands. Moreover, the counsel for

plaintiffs in error requested and secured an instruction to the jury by the trial Court to the effect that if they believed as to each of said witnesses who had so applied to purchase lands that he had entered into an agreement with defendants to convey the land to them, or any one of them, as soon as he secured title to the same, the jury should weigh his evidence with great caution and closely scrutinize it. (See Volume III, Transcript of Record, pages 1458, 1459 and 1460.)

In the case of *Commonwealth v. Smith* (Mass. 1895), 40 N. E. Rep. 189, it was held that on the trial of four aldermen for conspiracy to procure money to be paid to themselves for their votes for granting licenses, evidence by a witness that, while the conspiracy was in force, he and others were paying money in order to get licenses, and that one of the aldermen had received the money, is material.

So, likewise, in the case at bar, where the defendants are tried for conspiracy to suborn a large number of persons to commit perjury, it is material to show that the persons suborned did actually commit such perjury.

In *Lamb v. the State,* Supreme Court of Nebraska, 1903, 95 N. W. Rep. 1050, it was held that, where the defendant was on trial for instigating and procuring another person to steal cattle, the Court held that the declarations of the affiant as to his intention while engaged in the perpetration of the crime, were admissible in evidence.

In the *Cyclopaedia of Law and Procedure,* Volume 8 at page 685, it is said:

> "The evidence in a conspiracy is wider than perhaps in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances." (Citing Roscoe Crim. Evidence 88, approved in People v. Saunders, 25 Mich. 119.)

It is admitted by plaintiffs in error (see page 96 of their brief), that if the charge had been subornation of perjury, the intention of the applicants at the time of making their preliminary applications, and at the time of making their final proofs, might have become a substantive element of these offenses. As a matter of fact, the intention of the applicants in the foregoing brief is a substantive element of the offenses charged in this indictment, and is proveable under the allegations of the indictment, because the Timber and Stone Act makes such intention of the applicant a material element in that substantive law which the defendants in this indictment are charged with having conspired to suborn a large number of persons to commit perjury, in order to successfully violate and evade material provisions of.

The indictment itself charges that the defendants conspired to instigate and procure a large number of persons to commit the offense of perjury by taking their oaths that certain declarations and depositions

by them to be subscribed were true, and thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that the timber lands which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the exclusive use and benefit of those persons respectively, and that they had not, directly or indirectly, made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as the defendants would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with said defendants by which the titles which they might acquire from the United States in such lands would inure to the benefit of said defendants, Williamson and Gesner, and the matters so to be stated subscribed and sworn by the said persons being material matters under the circumstances, and matters *which the said persons so to be suborned,*

instigated and procured, and which the said defendants *would not believe to be true.*

It must certainly be competent under such an indictment to prove that the persons who were suborned to make such applications and entries of lands, did make such false statements at the time of making such applications and at the time of making their depositions in relation to the same, and that they intended to make such false statements, or in other words, that they wilfully swore falsely in relation to such matters, or in other words that they had such an understanding of the matters about which they were called upon to testify that they could not then and there have believed their own statements so then and there made to be true.

Of course, we do not mean to be understood as asserting that it is necessary to allege that the purpose of the conspiracy was accomplished, or that if it is alleged in the indictment that the purpose of the conspiracy was accomplished, it is necessary to prove it.

At common law, conspiracy was a misdemeanor, and if the conspiracy was to commit a felony and the purpose of the conspiracy was accomplished the crime of conspiracy was immediately merged into the higher crime of felony; and if it were proven upon the trial of the conspiracy charge that the purpose was accomplished a conviction for the conspiracy could not be had. Where, however, the conspiracy was to commit a misdemeanor there was no

merger, if the purpose of the conspiracy was accomplished, and it has never been doubted that it was proper upon the trial of the conspiracy to prove the accomplishment of the purpose as a fact or circumstance in connection with other facts and circumstances as tending to prove the existence of the conspiracy.

In the case at bar the defendants are charged with conspiracy to procure a large number of persons to commit perjury by falsely swearing that each one was applying to purchase a certain piece of land in good faith to be appropriated to his own exclusive use and benefit and not for "speculation". One of the objects of the conspiracy, therefore, was to have each applicant swear that he was not applying to purchase the land for "speculation", whereas, in truth and in fact he was so doing. The intent of each applicant in this respect at the time he was applying to purchase the land becomes material for the purpose of proving that the object of the conspiracy in this respect was consummated. We concede that it is not necessary to prove that the object of the conspiracy was consummated, but it is certainly proper to do so, for the reasons hereinbefore stated, and if it is proper to do so the testimony of the applicant as to what his intention was at the time he was subscribing and swearing to the truth of his preliminary application papers and at the time he was subscribing and swearing to the truth of his deposition upon making final proof is the most

satisfactory kind of evidence which can be produced. It is competent evidence when the intent or motive of the witness or party is a fact permissible to be proved upon the substantive law involved in the case for the purpose of showing the nature of the transaction.

> "In conspiracy cases in the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to come to a satisfactory conclusion."
>
> *8 Encyclopedia of Law and Practice,* p. 678.

> "Much discretion is left to the trial Court in a case depending on circumstantial evidence and its ruling will be sustained if the testimony which is admitted tends, even remotely, to establish the ultimate fact."
>
> *Id.* 679.

Counsel for plaintiffs in error at page 95 of their brief assign error as to the witness Evans, who was also an applicant to purchase land. The testimony of the witness, Jeff Evans, which is so assigned as error, will be found in Vol. 1, Transcript of Record, at page 431. By referring to the record it will be seen that the attorneys for plaintiff in error made no objection whatever to the first question quoted in their brief in relation to the witness Evans, nor to any of the other questions and answers of that witness which are quoted in their brief at pages 95 and 96. The brief states that the defendants objected to the following question upon the ground

that it was incompetent, immaterial and not binding upon them, to-wit:

"Now, at the time you signed that paper what " was your intent as to what you would do with the " land when you secured a patent to it?"

It is not contended in their brief that the Court made any ruling upon their alleged objection nor that they saved any exception to any such alleged ruling. The record shows that there was no objection, no ruling, and no exception.

The testimony of Jeff Evans, which immediately precedes that which is quoted in the brief of counsel for plaintiffs in error is instructive, and we quote it for the benefit of the Court. It commences on page 429 of the record and ends on page 431 of the record, immediately preceding the aforesaid question which is so assigned as error by counsel for plaintiffs in error in their brief.

" Q. Do you remember, at the time of swearing " to this paper, of reading or having read to you " this statement in it? 'That I do not apply to pur- " 'chase the land above described on speculation, " 'but in good faith to appropriate it to my own " 'exclusive use and benefit, and that I have not " 'directly or indirectly made any agreement or con- " 'tract in any way or manner with any person or " 'persons whosoever by which the title I may ac- " 'quire from the Government of the United States " 'May inure in whole or in part to the benefit of any

" 'person except myself?' Do you remember any
" talk about that?

" A. Well, I think I read the paper myself, and
" I asked Mr. Biggs how that would be and he said
" that as long as I did not make any contract I could
" go ahead and prove up on the land. That this
" that I would get out of it would be for my own
" benefit.

" Q. What did you understand by contract?

" Mr. BENNETT: I object to that as incompetent;
" the language speaks for itself. If he did not un-
" derstand Mr. Biggs' language it is not our fault.

" (Objection overruled. Defendants except.)

" Q. What did you understand then by the word
" 'contract'?

" A. Well, I supposed by making a contract that
" I would have to go into writing, that I would turn
" this land over to him or he would pay me, as long
" as I did not sell and take something on it, or sign
" a contract, that it was all right.

" Q. Did Biggs say anything about that to you,
" as to his idea?

" A. Yes, sir, he said that a man could prove up
" on a piece of land that way all right; it was all
" right as long as he hadn't made any agreement,
" and the way I understood it was that a man would
" have to go in writing.

" Q. Did he say anything about writing, himself?

" A. No—well, yes, he said that a man would
" have to go into writing or a contract.

"Q. Did you say for, or did you say or contract?
"A. For a contract."

Similar testimony was given by a number of witnesses including several, if not all of those whose testimony is assigned as error by counsel for plaintiffs in error, and which is hereinbefore discussed. Many of the applicants were ignorant, and the defendant Biggs took advantage of their ignorance by advising them that they had not entered into an agreement for the sale of the land which they were then applying to enter, such as is denounced in the Timber and Stone Act, unless the applicant had signed a written agreement to that effect. Biggs further explained to them that they could safely swear that they were taking up the land exclusively for their own benefit, respectively, because the profit which each applicant would make out of the land was for his own exclusive benefit. Even the witness, Joel Calavan, who was a school-teacher, testified that Biggs had explained both these matters to him in the same way, and that he so understood the transaction. The jury were entitled to have all the facts and to determine therefrom whether or not the witness testified truthfully in this respect as in all others. It was material for the jury to know whether or not these applicants had actually committed perjury in these particulars at the time of subscribing and swearing to their preliminary application papers before the defendant Biggs and at the time of subscribing and swearing to the truth of their deposi-

tions upon making final proof before the defendant Biggs as facts of greater or less weight constituting links in the chain of circumstantial evidence tending to prove a conspiracy between the defendants to procure a large number of persons, to-wit, those applicants and others to commit perjury in those particulars.

There is one other witness whose testimony in this particular is assigned as error by counsel for plaintiffs in error, at page 96 of their brief, to-wit: Christian Feuerhelm. All his testimony so assigned as error will be found in Volume 2, Transcript of Record, at bottom of page 546 thereof. An examination of the record discloses the following condition of the matter, to-wit:

"Q. You don't understand the question. At "the time you filed, did you intend to let Dr. Gesner "have the land when you got the title—at the time "you were signing that paper—filing?

"A. I guess I thought so.

"Q. You did think so?

"A. I think so."

It will be noticed that no objection whatever was made to the question by counsel for plaintiffs in error, although in their brief at page 96 they make the following statement, to-wit:

"To which defendants objected as incompetent, "immaterial, calling for a conclusion of the witness "and not binding upon them. Objection was over-"ruled and the witness answered."

The aforesaid testimony occurred upon the redirect examination of the witness after he had testified fully under cross-examination as to what he intended that he would do with the lands at the time he was filing upon the same.

It is respectfully submitted that upon the condition of the record as to these respective assignments of error the Appellate Court would not be warranted in interfering with the judgment even if the aforesaid testimony was improperly admitted.

But there is another substantial reason why the witnesses were permitted to testify as to their intentions and understanding at the time they filed upon the land and at the time they made their respective final proofs upon the same.

The record discloses the fact that all of the applicants were reluctant to admit under oath that they had wilfully committed perjury. With the exception of the entryman Jones they were practically all unwilling witnesses. One of them, John F. Watkins, testified in part as follows, under cross-examination by Mr. Bennett:

"Q. Didn't you testify at the first trial of this " case, Mr. Watkins, in answer to the question, 'As " 'a matter of fact, you held the land at a whole lot " 'more than you had any idea they would give you " 'for it, didn't you? You held it at $1,000, didn't " 'you?' and did you answer, 'Yes, I calculated to " 'ask him $800 or a $1,000 for it when the time " 'came to sell it to him.'

" A. I think I did, but I done it to favor them " men.

" Q. Done it to favor what men?

" A. These men indicated here. I didn't want " to swear a straight lie, but I did all I could with- " out it.

" Q. Do you mean to say that at the other trial " of this case you swore to a lie to favor them?

" A. I don't think it is hardly a lie. I might " have calculated on that date, but that was not the " understanding and that is not what I would have " done with it.

" Q. Was this true or false? You say you did " testify that? Was it true or false that you con- " templated asking him $800 or $1,000 for it when " the time came to sell it?

" A. Well, I don't know as it was true, and it " was not false, I thought of doing that after I made " final proof. I never thought of it before.

" Q. You thought of doing that after you made " final proof?

" A. Yes.

" Q. And you say now you testified in that way " at the other trial in order to favor the defendants?

" A. Yes.

" Q. And not to tell the truth?

" A. If I testified to do that, I don't know " whether I testified to do it before I made final " proof.

" Q. Well, you know whether you testified to it " to favor them, or not, don't you, Mr. Watkins?

"A. Yes, sir; I done it to favor them.

"Q. You done it to favor them?

"A. Yes, sir.

"Q. You do remember then, that you so tes-
"tified?

"A. Well, I think I did; I aimed to do that. I
"don't remember what I testified to, but after I
"made final proof, I intended to turn it over to
"them just as I agreed to do. I don't know what
"I testified to, exactly; I don't remember.

"Q. Did you testify at the other trial in answer
"to the question, 'And if they would give you as
"much as anybody else, you would give them the
"advantage? If they would give you just as much
"as anybody else, you would let them have it?
"That was your intention?' And did you answer
"that 'Yes'?

"A. I think I did.

"Q. And in answer to the question, 'And if they
"'would not, you would let somebody else have it?'
"And did you answer, 'Yes, or that I was free
"'to do that.'

"A. I don't remember what I answered.

"Q. You don't remember whether you answered
"that way or not? I suppose that if you did answer
"that way, you answered to favor the defendants?

"A. That is what I did."

See Vol. 1, Transcript of Record, pp. 313 to 316, both inclusive.

And again at page 320 and 321 of the Transcript of Record, the same witness Watkins under cross-examination, says:

"Q. Now did you also tell Doug. Lawson in the " presence of Green Beard and Henry Beard that " you were going to swear there was a contract to " save yourself from indictment, that you did not " think there was any contract, but you were going " to swear there was to save yourself from indict- " ment?

" A. No.

" Q. That being about on the 23d or the 24th of " August, about 10 o'clock, at the Albany room?

" A. That I knowed there was no contract. " That I was going to swear there wasn't one?

" Q. That you were going to swear there was a " contract to save yourself from indictment; that " you did not think there was any contract, but that " you were going to swear that there was to save " yourself from indictment?

" A. I don't remember anything of the kind. I " never swore yet there was any contract.

" Q. What say?

" A. I never swore yet there was any contract.

" Q. You haven't sworn there was any contract?

" A. I don't know what it takes to make a con- " tract. There was a fair and square understanding " about, but I don't know whether it is a contract " or not. I don't know what it takes to make a " contract—a verbal contract.

" Q. You don't know what it takes to make a " contract?

" A. No, not a verbal contract, I don't."

And again at page 326 of the record, under cross-examination, witness Watkins testified as follows:

" Q. Mr. Watkins, at the time you made these " sworn statements that were offered in evidence " here, did you believe them to be true?

" A. You mean the first ones?

" Q. Yes.

" A. Well, I didn't realize there was anything " wrong about them; I did not investigate it enough " to know.

" Q. Did you believe them to be true?

" A. What I said?

" Q. Yes.

" A. No, I don't know as I did.

" Q. What you swore to there?

" A. I never stopped to realize about it; I " thought it was all right, and Biggs told me I was " making no contract, that it was simply an under-" standing.

" Q. Well, you did not have any understanding; " you had not had any talk with Gesner at all, had " you?

" A. No, but what talk I had with Mr. Biggs and " their connections with the matter made me know " there was something in it.

" Q. Oh, you had an idea that you were expected " to convey?

" A. Yes, sir.

" Q. But you hadn't any arrangement with Ges-
" ner about that at all?

" A. Nothing, only from others, no sir. I never
" had spoke to Gesner until that time about it.

" Q. You testified at the first trial that you be-
" lieved those statements to be true, didn't you, when
" you made them?

" A. I don't know what I testified to.

"Q. Biggs told you, if you had made any con-
" tract to sell the land, you could not sign the affi-
" davit, didn't he?

" A. Yes.

" Q. Did he?

" A. Yes, sir.

" Q. When was it Biggs told you that?

" A. I think he told me twice; I think he told
" me the first time I ever talked to him about it,
" and he told me when I went up in the timber. He
" said, if I hadn't made any contract with Dr. Ges-
" ner it would simply be an understanding.

" Q. And he told you that you could not make
" any contract and then sign the affidavit properly,
" didn't he?

" A. That is what he did. He said I could not
" contract to sell the land before I proved up on it.

" Q. Yes, you could not contract to sell the land
" before you proved up on it. That was the first
" talk he had with you?

" A. I believe he told me that then, and I think
he told me before I went up in the timber too.

"Q. He told you two different times?

"A. I think so. He told me I was making no "contract; it would just simply be an understand- "ing between us that I was to convey the land when "I got the patent to it.

"I don't remember whether I did or not."

And again at page 337 of the record the witness testified as follows:

"Q. At the time your wife relinquished, or about "that time, did you receive any word from Dr. Ges- "ner by letter?

"A. No, I didn't get no letter from him then.

"Q. This letter was after they had relinquished "and before you had made final proof, or after- "wards?

"A. After I had made final proof, I think.

"Q. You got a letter from Dr. Gesner?

"A. Yes.

"Q. What did you do with it?

"A. I destroyed it.

"Q. What was the substance of it?

"A. It was that I had better relinquish my "claim; that we would get into trouble over the "Government, he was afraid if we went ahead any "further."

And again, upon re-cross examination, at page 339, the witness testified as follows:

"Q. What do you say now? Do you say now "you would have sworn to a lie and had your wife, "for $75?

" A. No, I would not. If I had thought there " was any lie about it I would not have had anything " to do with it. I knowed it was not exactly " straight, but I didn't think a man was swearing to " a lie—everybody was doing that, as Mr. Biggs " said, and there was nothing particularly wrong " about it.

" Q. Did you understand that it was not straight " and yet was not a lie?

" A. I didn't think it was exactly according to " law.

" Q. And yet you didn't think it was a lie?

" A. Yes, I didn't think I was swearing to any " lie about it, I didn't realize it.

" Q. Didn't realize it?

" A. No, I didn't.

" Q. As a matter of fact, you was not swearing " to any lie about it, was you?

" A. I don't know whether I was or not. It " looks kind of like it now to me.

" Q. What?

" A. It looks kind of like it to me now.

" Q. You think you were, now?

" A. It looks kind of like I was.

" Q. When did you begin to think you was " swearing to a lie?

" A. When this thing begin to investigate."

So also the witness Henry Hudson, Vol. 2, Transcript of Record, at page 485 thereof, testified as follows:

"Q. Did you receive a letter from Gesner?

"A. Yes, I did.

"Q. At the time Neuhausen was up there?

"A. No, it was before that.

"Q. How long before?

"A. Well, I think it was a week, or a week or " two, or such a matter.

"Q. What did you do with that letter?

"A. I burned it.

"Q. What was the substance of that letter?

"A. Well, he told me I better relinquish; that he " did not want us people in trouble up before the " grand jury, and I think he said that Moody was " on the back of it."

So also the witness Christian Feuerhelm, in Vol. 2, Transcript of Record, commencing at the bottom of page 547 thereof, testified as follows:

"Q. When you went and talked to him (Gesner) " about getting money from him, tell us what it " was that you said, and what he said, to the best " of your recollection; just what was said.

" A. Well, I answered this question a little while " ago.

" Q. I know it, but I want you to answer it " again now; your own way. I want you to tell " what it was.

" A. Well, I went over to him and asked him if " he wanted to have me to take up a claim, and he " says 'yes', and that is all I remember. He told " me to go into Biggs' office and he would fix it.

"Q. Well, wasn't something said about the money
" —or whether he would buy it or not?
" A. Yes, sir. He told me that he would give
" $500 for it after I made a deed, and that is all
" we spoke together."

This testimony was given on re-direct examination.

Upon the recross examination counsel for plaintiffs in error induced the witness to testify as follows:

"Q. He said he would give $500 when you got
" a title, didn't he?
"A. He told me he would give $500 for it when
" he got a deed, you know.
"Q. If you wanted to sell it. Ain't that what
" he said?
"A. That might be said. I couldn't say ex-
" actly.

And then upon a redirect examination at page 549 the witness testified as follows:

"Q. Now, did he say, 'if you want to sell it,' or
" did he put that in there at all?
"A. Well, I can't remember if he did say that.
" Q. Well, what is your best recollection as to
" whether he did or did not say 'if you want to
" sell'; whether he put that in? What is your
" best recollection as to whether he did or did not?
"A. Well, I can't answer that.

"Q. You can give your best recollection.

"A. I think that hasn't been said."

And at page 534 of the record the same witness, Christian Feuerhelm, testified as follows:

"Q. Now, then, do you remember the time that " Mr. Neuhausen was up in Prineville in 1904?

"A. Yes, sir.

"Q. You know him, don't you; that gentleman " sitting there?

"A. Yes, sir.

"Q. About that time, did you receive a letter " from Dr. Gesner?

"A. Yes, sir.

"Q. Is that the letter?

"A. I couldn't say; I guess it is. It has my " name on it.

"Q. What did you do with the letter which you " received?

" A. I gave it to Mr. Neuhausen."

Thereupon the letter was admitted to be the one which was given by Feuerhelm to Neuhausen at that time and it was offered and admitted in evidence, and appears at page 535 of the record and reads as follows:

"PRINEVILLE, ORE., May 13, 1904.

" Mr. Feuerhelm, Prineville, Ore.

"Dear Sir: That timber claim of yours and all " of the balance I have got to throw them up. " I am sure we would get into trouble over them

" before we got through with them, and then be " turned down on them. I know that Mr. Moody " and the Dalles Land Office are laying for us. " I do not want to get into any trouble over them, " and do not want any of my friends to get into " trouble. You go before Mr. Biggs and relin- " quish your claim.

"Yours respt.

"V. GESNER."

And thereupon the following questions were asked of the witness and the following answers made by him:

"Now, after getting that letter, did you do as " requested? Did you go and relinquish?

"A. Yes, sir.

"Q. Is that your signature?

"A. Yes, sir.

"Q. Before whom did you go?

"A. Before Mr. Biggs."

The paper shown the witness was his written relinquishment, dated May 14, 1904, and was offered and admitted in evidence.

In Vol. 1, at page 398 of the record, witness Wilford J. Crain, after testifying that he relinquished at the request of Gesner and that he and George Gaylord relinquished at the same time and then went to the office of Gesner and Williamson to get back their filing fees, testified as follows:

"Now, who was in Gesner's office when you got
" there?

"A. Mr. Williamson and Dr. Gesner.

"Q. What, if anything, was said while you were
" there? State all that was said that you can re-
" member.

"A. I don't remember much about what was
" said. Gesner wrote me out a check for the money
" what I was out for the fees for me and my wife.

"Q. Did you say anything to him about it be-
" fore he wrote it?

"A. I don't remember now whether I did or
" not.

"Q. I believe it was $19.50?

"Q. Do you remember how it was signed?

"A. No, sir; I do not.

"Q. What did you do with it after you got it?

"A. Put it in my pocket.

"Q. Well, what did you do with it after that?

"A. Why, I cashed it. I don't know when it
" was, whether it was the same day or not.

"Q. You went to the bank yourself, did you?

"A. Yes, sir.

"Q. On the Prineville bank?

"A. I think I did.

"Q. Did you see Gaylord get one?

"A. Yes, sir.

"Q. At the same time?

"A. Yes.

"Q. Was Williamson present when you received
" it?

"A. Yes, sir.

"Q. Well, Mr. Williamson said that he didn't " think it would be hardly safe to go ahead and " try to make final proof on the claims now that " there was—I believe he said Hitchcock was mak- " ing a little kick about timber frauds or something " in regard to that. He went ahead and read a lit- " tle sketch in the paper to us, in the 'Oregonian', " I believe it was, in regard to that. I don't re- " member just how it read now.

"Q. Anything said about taking up a claim " later?

"A. Yes. He said he thought later on we could " go ahead and file again and go ahead and prove " up on the claims."

The trial Court recognized the fact that the applicants were unwilling witnesses and were in effect accomplices of the defendants in the crime of perjury which was committed by them and likewise in the conspiracy to defraud the United States out of a certain portion of its public lands, and besides giving the instruction hereinbefore referred to in relation to the testimony of accomplices at the instance and request of counsel for plaintiffs in error, the trial Court permitted the prosecution to lead these particular witnesses whenever it appeared necessary to do so, and likewise to cross-examine them.

The importance and necessity of permitting the cross-examination of just such witnesses by the

prosecution is recognized by the Supreme Court of the United States in the case of *United States v. Budd,* 44 U. S. at page 165, in the following language:

> "With regard to the two defendants, they having once sworn that there was no agreement, there was nothing farther to disclose. If the government doubted their statements under oath, it could have called either one and cross-examined him to its satisfaction. It is familiar law that where a witness discloses in his testimony that he is adverse in interest and feeling to the party calling him, the latter may change the character of his examination from a direct to a cross-examination, and the opposing party is always adverse in interest. In Clarke v. Saffery, Ryan & Moody, 126, in which the plaintiff's counsel called the defendant as his own witness and sought to cross-examine him, Chief Justice Best said: 'If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as in the case here, the counsel may, as matter of right, cross-examine him.' See also People v. Mather, 4 Wend. 229; Bank of Northern Liberties v. Davies, 6 W. & S. 285; Towns v. Alford, 2 Alabama, 378."

The examination of the entrymen as to whether they had an "understanding" with Gesner was a perfectly legitimate cross-examination after some of them testified that they had no "contract" with him and especially after some of them testified that Biggs told them that they "could have an under-

standing but could not have a written contract", and particularly after some of them had testified that they understood that a "contract" had to be in writing or it would not be a contract. So, also, it was perfectly legitimate cross-examination to ask entrymen, who had so testified, what their "intention" was, as to conveying the land at the time they filed and made final proof, respectively.

POINT VI.

Other errors which are relied upon by plaintiffs in error in their brief commencing at page 98 thereof relate (a) to the admission of evidence as to the character of the land upon which the applicants filed, to wit, to the effect that it was not chiefly valuable for its timber, and that it was in fact less valuable for its timber than for grazing purposes; (b) and to similar offenses committed by the defendant Gesner cotemporaneously with the offense upon which he was being tried and in relation to lands which constituted an essential part of his general plan to acquire the control of a certain sheep range by acquiring all public lands, either State or United States, which were for sale within a certain area, so as to have all the lands so purchased make a compact body of land as nearly as possible.

It is also contended by plaintiffs in error that the aforesaid evidence was not admissible in rebut-

tal, even if it would have been admissible as a part of the main case of the prosecution. This contention is not tenable for the reason that such evidence is only admissible for the purpose of showing intent and knowledge or to prove the falsity of the defendant's theory of defense. Each and all of the defendants testified in their own behalf in the case at bar, and admitted certain facts but denied the alleged guilty intent with which they were done. Moreover, the defendants Gesner and Williamson testified to the reasons which caused them to suggest to the applicants that they should file upon the land and to loan the purchase money to each applicant. It was proper to cross-examine each defendant in regard to his statements as to the intent with which he acted in this matter and in regard to the reasons which he gave for so doing. In cross-examining the defendants it was proper to lay the foundation for impeaching them by showing that they committed similar cotemporaneous acts with guilty intent and as a part of the general plan, system and purpose, and with the same identical motive As a matter of course it was proper to thereafter introduce such impeaching evidence in rebuttal as tending to discredit the testimony of the defendants and to establish the falsity of their theory of defense.

In the case of *Wolfson v. United States,* 101 Federal, 434, the Circuit Court of Appeals says:

> "When a defendant is on trial for one offense, irrelevant testimony of the commission

of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it. In Wood v. U. S., 16 Pet. 342, 360, 10 L. Ed. 987, 994, the Supreme Court, Mr. Justice Story speaking for the Court, said:

" 'Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.'

"In the case of Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996, the defendant was indicted for the murder of Charles Palmer. The government relied mainly on circumstantial evidence. Some of this evidence tended to show that the defendant was also guilty of the murder of a man named Camp. Objection was interposed to that part of the evidence. Mr. Justice Brown, speaking for the Court in that case, said (at page 61, 150 U. S., page 28, 14 Sup. Ct., and page 998, 37 L. Ed.):

" 'The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it were otherwise competent.'

"The trial judge carefully limited the application of Moxey's evidence. The jury was instructed as to its purpose, and was informed that it was not offered, and could not be used, for the purpose of convicting the defendants

> of offenses for which they were not on trial. The fact that this evidence tended to prove another crime does not, as we have seen, exclude it. The fact that a prosecution based on the acts offered in evidence would have been barred by the statute of limitations is immaterial. If the evidence was relevant, it was not affected as evidence by the lapse of three years from the occurrences."

In the case at bar the trial Court carefully limited the application of all that class of evidence by the following instructions, to wit:

> "As I had occasion to admonish you during the course of the trial, however culpable you may believe the defendants or any of them may have been with reference to any offense testified to but not included in this indictment, or however well established you may deem the criminality of any of them in connection with any offense other than the one charged, you cannot find the defendants or any of them guilty unless you find, beyond a reasonable doubt, that they have committed the crime of conspiracy to suborn perjury as defined in these instructions, and as charged in the indictment. The examination into such collateral facts was allowed as tending to establish guilty intent, purpose, design or knowledge and should be so considered in such relation to the charge under which they are tried."
>
> See Vol. 3, *Transcript of Record*, pages 1461 and 1462.

And the trial Court further instructed the jury upon the same subject as follows:

> "There has also been some evidence introduced before you tending to show the acquisi-

tion of certain lands in an unlawful manner by defendant Van Gesner, which lands belong to the State of Oregon, situate near to the public lands described in the indictment in this case. This evidence is admitted as tending to show a pre-existing design, plan or scheme on the part of the defendants Van Gesner and Williamson, as bearing upon the question of motive in the doing of the particular acts charged in the indictment; and it is limited in its relevancy to the charges against Williamson and Gesner. It has no relation to the defendant Biggs, and you cannot consider it as bearing upon the question of Biggs' guilt or innocence.

"There is, too, some evidence before you in relation to the character of the land applied for by some of the applicants, that is, whether it was heavily timbered, or stony, or the like. The question of whether or not the lands applied for by the several entry men and entry women were lawfully of a character subject to entry under the timber and stone law, is not directly involved in this charge of a conspiracy to suborn. The relevancy of such evidence is the relationship it may have to the motive or intent or design of the defendants in the doing of the acts charged against them in the indictment under which they are tried."

See pp. 1463 and 1464, *Transcript of Record.*

The character of the case under consideration has necessarily to be taken into account in passing upon questions affecting admission and exclusion of evidence.

In the case at bar the evidence shows that the defendants Williamson and Gesner were in the sheep business and that they had a summer range at a

place known as the "Horse Heaven" country in Crook County, Oregon, at a distance of about twenty miles from the town of Prineville, where they resided, and where Dr. Gesner had for many years been a practicing physician. All the odd sections of the township which constituted their summer range were owned by a wagon road company and for a number of years prior to 1902 Williamson and Gesner had leased several of the odd sections of land from that wagon road company. They owned the land upon which their shearing plant was located at the summer range and did not own any other land in that vicinity. The wagon road company had uniformly refused to sell any of its lands there. In May, 1902, defendants learned that a rival sheep firm by the name of Morrow and Keenan had contracted to lease from the wagon road company practically all of the odd sections of land in the aforesaid township, and they immediately protested to the agent of the wagon road company against its leasing said lands to their rivals and insisted that they were entitled to have a lease for all of such odd sections of land themselves. The agent of the wagon road company decided, however, that he must stand by his agreement with Morrow & Keenan. Thereupon Williamson and Gesner immediately employed the County Surveyor to run the lines of the different sections of land in said township for the purpose of determining whether or not the springs and small streams of water which are located in said township were upon

the odd or even sections thereof. A rough survey demonstrated that the most valuable springs and streams were upon the even sections of land, which still belonged to the United States. The aforesaid township constituted the best summer sheep range in that part of Oregon. It was partially covered by scraggly timber, which had no market value at the time, if at all. In many places there were long stretches of splendid grazing land upon which there was not a stick of timber of any account. The defendants, Williamson and Gesner, immediately planned to secure all of the even sections of land which contained springs or running water so as to control this entire summer range. In June, 1902, they applied to the bank at Prineville for a loan of three thousand dollars and secured the same, and a few months later they applied to the bank at Dalles, Oregon, for a loan of six thousand dollars, and secured the same, and all of this money was advanced by them to the applicants in payment to the Government for their respective purchases of land. Gesner employed Biggs to attend to the matter of securing applicants for him and of filing them upon the land. Biggs was a practicing attorney and was a United States Court Commissioner at Prineville. The evidence shows, and it was admitted by the defendant Gesner, that forty-five applicants filed upon lands selected for them by him at and in the aforesaid township within a period of about two months. Biggs, Gesner, Williamson and Williamson's wife all filed upon land at the

same time with eight or nine of the other applicants. The evidence clearly shows that these lands were selected by Gesner without any regard to the amount of timber that was on them and solely for the purpose of controlling said sheep range in said township. The testimony of the various applicants shows conclusively that not one of them filed upon the land because it was valuable chiefly for its timber. On the contrary, the evidence clearly shows that very little, if any of the land, was valuable chiefly for its timber.

In the case of *United States v. Budd,* 144 U. S., p. 167, the Supreme Court, in discussing the meaning of the Timber and Stone Act, says:

> "We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is 'chiefly'. Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation."

In the case at bar each applicant admitted that he did not examine the land upon which he filed for the purpose of determining whether or not it was as good as or better than any of the other land

in that vicinity in regard to the amount of timber growing upon it, and admitted that he filed upon that particular piece of land solely because it was the piece selected for him by the defendant Gesner.

In the case of *United States v. Budd,* at page 163, the Supreme Court said:

> "Nor is this a case in which one particular tract was the special object of desire, and in which, therefore, it might be presumed that many things would be risked in order to obtain it; for it is clear from the testimony that not the land but the timber was Montgomery's object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose. This is evident, among other things, from the testimony of one Tipperry, upon which some reliance is placed by the Government, which was that Montgomery offered him one hundred dollars, besides all his expenses, if he would take a timber claim in that vicinity (no particular tract being named) and afterwards sell to him."

In the case at bar the evidence clearly shows that Williamson and Gesner were not desirous of purchasing timber lands in a particular vicinity for the purpose of securing the timber. On the contrary, what they desired was to secure the land itself for grazing purposes. The evidence shows that there was strong rivalry between the sheep men and the cattle men for possession of that particular range, as well as between the defendants Williamson and Gesner and the firm of Morrow & Keenan. Under these circumstances "it might be

"presumed that many things would be risked in "order to obtain it". It is apparent that "one "particular tract was a special object of desire" on the part of Williamson and Gesner. They wanted these lands for a sheep range. They wanted to secure the springs and small streams which were upon these lands for the purpose of controlling the entire range within that township. They had been occupying the range for several years and had just discovered that they were about to lose control of it by reason of the fact that the wagon road company had leased the odd sections which they wanted to Morrow & Keenan.

It is difficult to imagine a case in which it would be more important to establish the motive, if any existed, by which defendants were actuated to commit the crime with which they are charged in the indictment.

In the case of *Moore v. United States,* 150 U. S., p. 60, the Court said:

> "We think it was within the discretion of the Court to admit the testimony in dispute of Kitty Young. As intimated in the case of Alexander v. United States, 138 U. S. 353, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a Court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the

minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an Appellate Court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this Court in Castle v. Bullard, 23 How. 172, 187, that 'whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other'. And in Hendrickson v. People, 10 N. Y. 13, 31, it is said that 'considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life'. See also Shailer v. Bumstead, 99 Mass. 112, 130; Commonwealth v. Coe, 115 Mass. 481, 504; Commonwealth v. Pomeroy, 117 Mass. 143; Murphy v. People, 63 N. Y. 590, 594; Kennedy v. People, 39 N. Y. 245; People v. Harris, 136 N. Y. 423; Commonwealth v. Abbott, 130 Mass. 472."

The case of *Olson v. United States,* 133 Federal, 849, decided by the Circuit Court of Appeals, Eighth

Circuit, Nov. 23, 1904, is very instructive upon the question of the admissibility of evidence tending to show intent, knowledge and motive upon the part of the defendants and of any person whose motive or intent may become material for the purpose of showing the nature of the particular transaction with which he is connected, although that particular person's intent or motive may not be one of the issues in the case. In the *Olson* case the defendants were indicted for conspiracy to defraud the United States by means of illegal entries of timber lands by different persons. A number of separate indictments were returned against the same defendants relating to the acquisition of different pieces of land at about the same time and the cases were consolidated for trial and this fact among others was assigned as error by the plaintiffs in error. The Appellate Court held that they were all the same class of crimes and offenses and might have all been joined in one indictment in separate counts thereof, and that where there are several indictments which might have been joined in one indictment they may be consolidated for one trial under Section 1024, Revised Statutes of the United States.

In discussing the meaning of the Timber and Stone Act the Court says at page 853:

> "This view of the meaning of the statute forbids sustaining the contention of counsel for plaintiff in error that there can be no violation of the act unless an enforceable agreement

was made by the applicant before his application to enter the land whereby the title should inure to the benefit of another. To hold that the provisions of the statute that the applicant shall not have in any manner, directly or indirectly, made any agreement or contract whereby the title which he may acquire shall inure to the benefit of any one except himself, contemplates an agreement or contract in writing good under the statute of frauds, would be to destroy the prohibitive conditions mentioned, and render ineffectual the object and purpose of the statute."

And at page 854 in the same case, in commenting upon the admission of evidence of similar offenses committed at or about the same time for the purpose of assigning the intent of the parties in the case on trial, the Court said:

"We see no objections to the validity of the indictments which were dismissed; but, even though they were invalid, no prejudice resulted, as all the evidence received was admissible under the indictment upon which the conviction was had. The charge was conspiracy to defraud the United States out of a large tract of land. A portion of the lands were embraced in each indictment, and in the trial of either case evidence which tended to establish other related acts of the same character, done at or about the same time, were admissible as tending to establish the motive and intent of the defendants. In Wood v. United States, 16 Pet. 342-360, 10 L. Ed. 987, it was said:

" 'Fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive, but all combined

> together may become almost irresistible as to the true nature and character of the transaction in controversy. The case of Irving v. Motley, 7 Bing. 513, turned upon this very point. There the action was trover to recover back goods which had been purchased by an agent for his principal by means of a fraud. In order to establish the plaintiff's case it became necessary to show that other purchases had been made by the same agent for the same principal, under circumstances strongly presumptive of a like character. No doubt was entertained by the Court of the admissibility of the evidence.' "

At pages 856 and 857 the Court further discusses the question of the character of evidence which is admissible for the purpose of establishing the conspiracy to defraud the Government out of the land and particularly to establish the intent of the defendants when the case is tried upon the theory advanced by them that the entries were made by the respective entrymen in good faith and not for speculation or under a prior contract or agreement to convey the same to the defendants as soon as title was acquired. The statements of the Court upon this subject are so applicable to the case at bar that we feel justified in quoting from them at length. The Court said:

> "The indictment was based and the trial had upon the theory that these entries were not made in good faith by the several entrymen for their own use, but were made for the use and benefit of one or all of the defendants. A large amount of testimony was introduced for that purpose; in other words, it was sought to establish that the various entrymen, at the time

they made their entries at the land office, did not intend the purchase to be for their own use and benefit, but as the agent or hireling of the defendants, for the use and benefit of the defendants, or some of them. We have before said that it was not necessary for the Government to establish an express agreement that the entry was made for some one other than the entryman, but that it was competent to show that the motive and intent of the party making the entry was that it was for the use and benefit of another; that the question for the jury to determine was, what was the purpose, intent and motive of the parties when they made the entry? That being so, it follows that the intent and motive of the party was the subject of inquiry; and the law we think to be that, whenever the motive, belief or intention of the person is a material fact to be proved under the issue, it is competent to prove what such motive, belief or intention was by the direct testimony of such person, whether he happens to be a party to the action or not. Berkey v. Judd, 22 Minn. 287; Garrett v. Manheimer, 24 Minn. 193; Gardom v. Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310; Frost v. Rosecrans, 66 Iowa 405, 23 N. W. 895; Bradner on Evidence, 390. The testimony of such party as to his intent and motive is not conclusive, but is competent. We do not wish to be understood as saying that, had the Government shown a specific, express agreement between the entrymen and the defendants that in consideration of a given sum they would enter the land and then convey to the defendants, such testimony would be admissible. It is unnecessary to now pass upon such a case. What we do decide is that where it is sought to show by a chain circumstances that a party in doing an act was actuated by an illegal purpose and motive, it is competent for the party

to testify directly that he had no such purpose or motive; and, also, where it is sought to show by a chain of connected acts and circumstances that an agreement existed, an agreement requiring the concurrence of minds, that it is competent for a party to such alleged agreement to testify directly that no such agreement existed.

"Defendant offered evidence to show the value of the timber upon the land in question. This was objected to as incompetent and immaterial, and the objection sustained. While it is true that, if the evidence established the existence of the conspiracy and the overt act as alleged, it would be immaterial what the value of the timber was, yet we think its value competent evidence to be considered in connection with all the other facts and circumstances as bearing upon the question whether or not the entry was made in good faith or for the use and benefit of another. We think it would have been competent for the Government to have shown, had it been a fact, that the timber upon each tract was worth, say $1,500, and that the same was sold for $500, as bearing upon the question whether the entry was made pursuant to a prior arrangement or agreement that it should be for the benefit of the purchaser. In all cases involving the fraudulent transfer of property we understand the law to be that inadequacy of consideration is a circumstance to be considered in determining the bona fides of the transaction; and it would be competent for the Government to show inadequacy of consideration as a circumstance bearing upon the good faith of the transaction, we see no reason why it was not competent for the defendant to show that full consideration was paid, as bearing upon the bona fides of the transaction. We adhere to the rule announced in Golden Reward Min. Co. v. Buxton Min. Co.,

97 Fed. 413, 38 C. C. A. 228, wherein it was announced by this Court:

" 'That testimony which does have some tendency to establish a material fact may be rejected by a trial judge, and should be rejected when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case and protract the trial beyond reasonable limits.'

"We do not think, however, that the qualification of the general rule there announced applicable to this case, as it does not appear that this question of value would have necessarily protracted the trial or had a tendency to divert the attention of the jury from the real question; and, as we think the question of value a proper circumstance to be considered in determining the good faith of the transaction, the testimony should have been admitted. There is, however, another reason why the testimony should not have been excluded. The Government gave in evidence the affidavits of the various parties, when filing papers in the land office, showing the value of the timber upon each quarter section to be from $700 to $800. True it is that this was not offered by the Government for the purpose of showing the value, yet the value thus stated was before the jury, and we cannot say that it did not have some influence when considering the other evidence in the case, in determining the good faith and bona fides of the various entries. Where the Government gives in evidence the declaration of a party upon a material matter, we think it competent for the party to show what the real fact is in respect thereof."

In the case at bar it is apparent from the evidence, as has been before stated herein, that each

entryman conspired with the defendants to defraud the Government out of the particular piece of land upon which he filed, and if the defendants herein had been tried for conspiring to defraud the Government out of all the lands filed upon by said forty-five entrymen it must be conceded that the intention of each entryman at the time he filed upon the land and at the time he made his final proof would be material and could be proven by his own testimony as well as by circumstantial evidence such as his action in disposing of the land by conveying the same immediately after receiving his final receipt had the transaction progressed to that point. It cannot be doubted that his intention could be proven by his own testimony. His testimony would not be conclusive as to the fact, but it would be highly persuasive and clearly competent. In the case at bar an express agreement between the entrymen and the defendants that in consideration of a given sum they would enter the land and then convey to the defendants was not proven, at least as to some of the entrymen, and it was claimed upon the trial by the defendants that no such express agreement was made with any one of the entrymen, and it was insisted by defendants upon the trial that all of the entries were made in good faith by the several entrymen for their own use, under an agreement to permit the defendants Williamson and Gesner to graze their sheep upon the land in lieu of paying interest upon the purchase price of the land which was to be loaned to each

entryman at the time of making his purchase from the Government. The Government relied upon a chain of circumstances to prove that the defendants in the case at bar procured each and every one of the forty-five entrymen to swear falsely in making his application and in making his final proof by swearing that he was not taking the land on speculation, but was taking it for his own exclusive use and benefit, and that he had not, either directly or indirectly, made any contract or agreement with any person whomsoever by which the title which he acquired to the land would inure to the benefit of any other person whomsoever; whereas, in truth and in fact, he was applying to purchase the land on speculation and under a prior understanding and agreement to convey the title to the defendants as soon as he acquired it from the Government. The fact that the land in many instances which was filed upon by certain entrymen contained very little timber and that such timber contained no market value was one of the circumstances relied upon as constituting a link in this chain of evidence, and the fact that the defendants, Williamson and Gesner, needed the land for grazing purposes, and that in most instances it contained springs and running water and was valuable to them for grazing purposes and was more valuable for such purposes than for its timber, was another circumstance relied upon by the prosecution. These facts tended to prove *motive* on the part of defendants in conspiring to suborn the en-

trymen to commit perjury as alleged in the indictment. They bear upon the *bona fides* of the transaction and the good faith of the entrymen as known to the defendants, because it is indisputably proven that one of the defendants selected the land to be filed upon for each of the forty-five entrymen, and the evidence strongly tends to prove that in each instance the land was selected by said defendant solely with reference to its availability and usefulness for grazing purposes and to enable him to control that summer range, and these facts also tend to prove that what the defendants Williamson and Gesner wanted was the *land* and *not the timber.*

In the *Olson* case the entrymen "were all informed by Olson that they could make $50 by "taking a piece of land under the Stone and Timber Act, but were also informed by him that "under the law they could not offer to sell it until "after they had made final proof".

Of course the prosecution was not bound by this express statement, which was indisputably established as having been made by the defendant to each entryman, and, as the court held, it was clearly competent, nevertheless, to prove that at the time each entryman filed and made his final proof he *did intend* to convey the land to Olson in consideration of a net profit of fifty dollars.

The case is on all-fours with the case at bar, as to the principle involved, to wit, the right to prove

that the object and purpose of the conspiracy, as accomplished and consummated, was a fact or circumstance tending to prove a link in the chain of circumstantial evidence that the conspiracy had been entered into. If it is competent to prove that the Government was actually defrauded of the land, under an indictment charging the defendants with conspiracy to defraud the Government out of the land, it would logically follow that it is competent to prove that perjury was actually committed by certain parties under an indictment charging the defendants with conspiring to suborn those persons to commit perjury.

In Volume 3, at page 1144 of the Record, Campbell Duncan, one of the entrymen, testified as follows:

"Q. What did Gesner say:

"A. Why, he said that he would loan us, I think " it was $450 or $475 when we proved up and gave " him a mortgage on the land, for thirty or sixty " or ninety days, something like that. When we " were ready to turn it over, he would pay the " balance; the remainder of the $500 for the deed."

And commencing at the bottom of page 1148, the witness, in testifying about his signing and swearing to his original application papers before the defendant Biggs as U. S. Commissioner, testified as follows:

"Q. Do you remember as to whether anything " special was said about that, and as to your right

" to have any agreement or understanding with Dr.
" Gesner or any one else as to what was to be-
" come of the land after you got title? Do you
" remember whether Mr. Biggs said anything about
" that at the time?

"A. Who was to get the land?

"Q. Yes, or what right you might have?

"A. He said we could have an understanding.
" We could not make any contract.

"Q. What did you understand by contract?

"(Objected to as immaterial and incompetent. Ob-
" jection overruled. Defendants except.)

"A. I thought that it had to be drawed up in
" writing.

"Q. Now, at the time that you signed this, what
" was your intention as to what you were going
" to do with the land when you got title?

" Mr. BENNETT: That all goes in subject to our
" objection, I suppose, your Honor?

"A. I intended to let them have it.

"Q. (COURT): Intended what?

"A. To let Gesner have the land.

"Q. To let him have it for what considera-
" tion?

"A. For the remainder of the $500, that would
" be about $75.

"Q. Who was to furnish the final proof money?

"A. Gesner.

"Q. Now, who attended to the publication of
"the notice, do you know, and payment to the news-
" papers?

"A. They did.

"Q. You didn't do anything about it?

"A. No.

"Q. After signing these papers, did you take " them with you, or what did you do with them?

"A. No.

"Q. What did you do with them? Leave them " there with Biggs?

"A. I think so."

The witness then proceeded to testify that both he and his wife relinquished their filings, without making final proof on the land, and that they did this at the suggestion of Gesner and Williamson, just before the time arrived for making final proof. The witness was working at a livery stable in Prineville, and Gesner went to the stable and took the witness to his office, where Williamson was seated, and told the witness that he could not let him have the money to prove up, and that Dr. Gesner picked up the "Oregonian", and handed it to the witness and told him to read a certain article that was in it. The article appears at pages 1155 to 1157 of the Record, and reads as follows:

"HITS THE SHARKS.

SECRETARY HITCHCOCK ON PUBLIC LANDS.

POINTS TO OREGON CASES.

Urges Early Appeal of the Timber and Stone Act, and Penalty for Law Violators.

Bold Words on the Evil of Fencing the Public Domains by Private Interests—New Irrigation Law, Forest Reserves.

"Oregonian News Bureau, Washington, D. C., Nov. 23.—The recently discovered timber frauds in Oregon are rather widely exploited in the annual report of Secretary Hitchcock of the Interior Department, and held up as a forceful argument for the immediate revisions of the Timber Laws. Although the Secretary cites facts and figures heretofore published in the 'Oregonian', he is gracious enough to omit from his official report the name of the State in which these frauds were discovered. His comments, nevertheless, are so pointed and so explicit that they cannot be mistaken. After showing the phenomenal increase in entries in Oregon under the Timber and Stone Act, in the last quarter, over those of the preceding three months, the Secretary says: 'Should this rate of entry continue during the entire year in that State, it would mean the acquisition, in round numbers, of 600,000 acres of timber lands under the Timber and Stone Act, and if the same activity in that class of entries were extended to the other public land States, then before the expiration of two years practically every acre of unappropriated public timbered lands would have been absorbed, and the successful operation of the Reclamation Act of June 17th last rendered doubtful, if its failure be not absolutely as-

sured, for the reservation of public timbered lands that must of necessity be made to assist in conserving the waters to be impounded by the irrigation systems to be established under that act will be defeated or made so expensive by the purchase of said lands from private owners as to greatly delay the completion of the irrigation systems contemplated by that act.

"The reports of the special agents of this department in the field show that, as some of the local land offices, carloads of entrymen arrive at a time, every one of whom makes entry under the Timber and Stone Act. The cost of 160 acres of land under that Act and the accompanying commissions is $415. As many as five members of a family who, it can be readily shown, never had $2075 in their lives, walk up cheerfully and pay the price of the land and the commissions. Under such circumstances, there is only one conclusion to be drawn, and that is, where a whole carload of people make entry under that Act, the unanimity of sentiment and the cash to exploit it must have originated in some other source than themselves.

"*Punishment for Violators of the Law.*

"In all such cases a rigid inquiry will be instituted, to determine the *bona fides* of the entry, and if it be ascertained that the entry was not made in good faith, but in the interest of some person or persons other than the entrymen, the entry will be promptly canceled and the proper criminal proceedings instituted against the entrymen."

The witness testified as follows, as to what occurred after he read the article:

"Q. What was said after the paper was hand-
" ed to you to read and you read it, by either Wil-
" liamson or Gesner?

"A. Gesner said that I better go and relinquish; " that Hitchcock was mad." (See Transcript of Record, page 1154.)

At page 1157 to 1159 of the Record, the witness testified as follows:

"Q. Now, when you went to Biggs' office to " sign that relinquishment, what was said by Biggs, " if anything?

"A. Well, when I told him what I came for, " he drew up them papers. I don't remember that " he said anything in regard to it.

"Q. What, if anything, was said about filing " fees? Had you paid your own filing fees, or who " had paid them?

"A. I had given my note for the money.

"Q. At the time you filed, you gave a note for " the filing fees, did you?

"A. Yes, sir.

"Q. And for the publication notice?

"A. Yes, sir.

"Q. How much did you give the note for?

"A. I think it was $19.00. I and my wife.

"Q. That was for you and your wife. At the " time of filing, what was said about the giving of " that note? What was the conversation in relation " to it?

"A. Why, I spoke to Gesner in regard to letting " me have the money to file. I had the money, " but I had use for it; he said he couldn't let me " have it, couldn't, or something that way, and

" walked away. But later on, he came back and " said that Biggs would fix that up when I went " up there to his office, and he drew up the note " when I went up there.

"Q. Where were you working at that time?

"A. For William Adams.

"Q. On the farm?

"A. Yes, sir.

"Q. What wages?

"A. $35 a month.

"Q. Had you saved up any money? Were you " ahead any?

"Mr. BENNETT: That is all objected to as im- " material and incompetent.

"COURT: I think it is competent to show whether " he had any money.

"A. I didn't have very much.

"Q. What do you call much? How much did " you have?

"A. $15 or $20.

"Q. Now, then, at the time that you relinquished, " what was said about the note, if anything? Or " what was done about it?

"A. Well, after I relinquished, why Biggs had " overlooked it, and then I called his attention to " that note, and he handed it to me."

The foregoing article from the "Oregonian", of date November 24th, purporting to be a telegram from Washington, D. C., dated November 23rd, and entitled "Hits the Sharks", was also shown to the

entrymen, Wilford J. Crain and George Gaylord, immediately after they had relinquished their filings, in accordance with a request sent to them by Gesner. The defendant Williamson was present in Gesner's office when Crain and Gaylord arrived there from Biggs' office immediately after relinquishing. The testimony of Crain as to what occurred at that time appears at pages 398 and 399 of Volume 1, Transcript of Record, and reads as follows:

"Q. Who else was there when you went before " Biggs to relinquish?

"A. George Gaylord.

"Q. Now, where did you go from Biggs' office?

"A. Why, I think I went down town a little bit, " and then to Dr. Gesner's office.

"Q. Did anybody go with you to Gesner's of- " fice?

"A. Yes, sir.

"Q. Who?

"A. George Gaylord.

"Q. Now, who was in Gesner's office when you " got there?

"A. Mr. Williamson and Dr. Gesner.

"Q. What, if anything, was said while you were " there? State all that was said that you can re- " member.

"A. I don't remember much about what was " said. Gesner wrote me out a check for the

" money what I was out for the fees for me and " my wife.

"Q. Did you say anything to him about it be- " fore he wrote it?

"A. I don't remember now whether I did or " not.

"Q. I believe it was $19.50?

"Q. Do you remember how it was signed?

"A. No, sir; I do not.

"Q. What did you do with it after you got it?

"A. Put it in my pocket.

"Q. Well, what did you do with it after that?

"A. Why, I cashed it. I don't know when it " was, whether it was the same day or not.

"Q. You went to the bank yourself, did you?

"A. Yes, sir.

"Q. On the Prineville bank?

"A. I think I did.

"Q. Did you see Gaylord get one?

"A. Yes, sir.

"Q. At the same time?

"A. Yes.

"Q. Was Williamson present when you received " it?

"A. Yes, sir.

"Q. Well, Mr. Williamson said that he didn't " think it would be hardly safe to go ahead and " try to make final proof on the claims now; that " there was—I believe he said Hitchcock was making " a little kick about timber frauds, or something in

" regard to that. He went ahead and read a little " sketch in the paper to us, in the "Oregonian", I " believe it was, in regard to that. I don't remem- " ber just how it read now.

"Q. Anything said about taking up a claim " later?

"A. Yes. He said he thought later on we " could go ahead and file again and go ahead and " prove up on the claims."

Tr. of Record, Vol. I, pages 398, 399.

The entryman and witness George M. Gaylord testified in regard to said "Oregonian" newspaper article, and his own action in relinquishing his filing is as follows:

"Q. Well, if there was any talk with Gesner, " is what I am getting at. Did you have any talk " with Gesner before proving up or before the time " came for final proof?

"A. No, not before I went to prove up.

"Q. When you went to prove up did you have " any talk with Gesner?

"A. I talked with him that day, yes, sir.

"Q. Did you talk with Biggs first?

"A. Yes.

"Q. What talk did you have with Biggs?

"A. He said he had decided not to let any more " prove up.

"Q. Tell all you remember of that conversation?

"A. And if we would go to Mr. Gesner he would " pay us back our filing fee.

"Q. What did you say to him?

"A. I told him I would go and see Mr. Gesner, " and I did.

"Q. Did you say anything about proving up " to Biggs? Did you say anything to Biggs as " to what your wish was in the matter of proving " up?

"A. Not that I remember of.

"Q. Do you remember of his giving you any " other reasons than that you have stated? Did " he say anything about why Gesner was—

"A. I believe he said there was a disturbance " about this land business, and they had decided " not to prove up any more claims until it passed " over.

"Q. You say you went to see Gesner? Where " did you find Gesner?

"A. I found him in his office.

"Q. Was there anybody else there?

"A. Wilford Crain and Mr. Williamson.

"Q. Was Wilford Crain with you when you were " in Biggs' office?

"A. Yes, sir.

"Q. Now, in Gesner's office, who else was there " beside Crain and Gesner?

"A. Mr. Williamson.

"Q. What talk took place there?

"A. Well, we talked with Mr. Gesner about " proving up on the land and he said he was sorry " that we couldn't go ahead, but he thought that

" after this scare was over we would be able to go " ahead and prove up on the land. And Mr. Wil- " liamson was reading the 'Oregonian', and he read " a little sketch out of it where Mr. Hitchcock was " raising a kind of an excitement over this land " business.

"Q. Can you remember the substance of any " that he read?

"A. No, I don't.

"Q. Do you remember anything else that was " said there?

"A. No, I don't recall anything else to mind " now.

"Q. Do you remember anything being said about " it not being safe to go ahead then?

"(Objected to as leading. Objection overruled. " Defendants except.)

"A. Why, I don't remember whether that was " all there in Gesner's office, or whether it was " spoken of in Biggs' office.

"Q. Was it spoken of in one place or the other?

"(Same objection. Same ruling. " Same exception.)

"A. That is my impression that it was, but I " would not say positively.

"Q. Did you get the money back for your filing " fees?

"A. Yes, sir.

"Q. Who gave it to you?

"A. Mr. Gesner gave me a check for it on the " Prineville Bank.

"Q. Did Crain get his?

"A. Yes.

"Q. Did you see him get it?

"A. Yes, sir.

"Q. How did he get his?

"A. He got that by check the same as I did.

"Q. Was it right there in the office?

"A. Yes, sir.

"Q. Was Williamson present?

"A. Yes, sir.

"Q. How were the checks signed?

"A. I think by Williamson and Gesner.

"Q. Was it on a Prineville bank?

"A. Yes.

"Q. Did you cash it?

"A. I did.

"Q. The same day?

"A. Yes.

"Q. Did you see Crain cash his?

"A. No, I did not see him cash his.

"Q. On that day did you relinquish before or " after the talk with Gesner?

"A. Afterwards.

"Q. Is that your signature?

"A. Yes, sir.

"Q. Did you have any further talk with Biggs " when you went back to relinquish?

"A. Not that I remember of."

Tr. of Record, Vol. III pp. 1370, 1371, 1372, 1373.

The foregoing evidence has been quoted for the purpose of giving this court a knowledge of the character of the evidence of the entrymen, without the necessity of reading three volumes of Transcript of Record.

Another significant circumstance which is to be noted, and which is indisputably proven by the evidence, is, that at the time these filings were being made there was another U. S. Court Commissioner living in Prineville, who had power and authority to accept filings and final proof from timber entrymen, and that there was, likewise, a clerk of a court there who had the same power, but that all entrymen were sent by Gesner to Biggs, and that all of the entrymen made their applications and their final proofs before Buggs, with the exception of one or two, who appeared at Biggs' office for the purpose of making final proof at the time specified in their notices, on a certain day, and who were then and there examined upon their final proofs by a man named Boggs, who was a clerk and office-associate of Biggs, and who stated that Biggs was out of town. After the final proofs were signed by the entrymen, Boggs accompanied the entrymen to the County Clerk's office, and there the Deputy County Clerk swore them and affixed his jurat.

POINT VII.

The only other assignments of error which counsel for plaintiffs in error have argued in their brief are those relating to the testimony of the witnesses Perry and Swearingen.

This testimony was clearly competent, for the purpose of establishing knowledge, intent, motive and pre-existing design, system and scheme, and it was strictly limited to that purpose by the court at the time it was admitted. The court also instructed the jury very particularly and carefully in regard to it. The attempt of Gesner to induce Perry to file upon school land was made at the very time that the fraudulent timber entries were made at Gesner's request, to wit: in June, 1902. The particular land upon which Gesner requested Perry to file was located in the center of the same township in which the timber claims were located, and the school land was so located that it was almost invaluable to the perfection of the plan of the defendants for securing the ownership and control of that sheep range. The school land which was filed upon by Mrs. Swearingen was the same which Perry was requested to file upon, or joined it.

The theory upon which the testimony was permitted to be introduced will be seen by reading the cross-examination of the defendant, J. N. Wil-

liamson, at pages 1091 to 1094, of Volume III, Transcript of Record. It reads as follows:

"Q. Then, Mr. Williamson, on June 24 I call " your attention to the entry on the debit side of " Williamson, Wakefield & Gesner's account of " the First National Bank of Prineville, Oregon, " and entry of June 24, 1902, $200; and I call your " attention to a certified copy of a letter by J. J. " Smith, County Clerk at Prineville, to M. L. " Chamberlain, Clerk of the State Land Board, " inclosing an application to purchase State Land " of Mary A. Swearingen, and a draft of $200 in " full payment for the same. Now, with these two " things to refresh your memory, didn't you have " a talk with Dr. Gesner prior to June 24 and in " June, while you were up there on that trip, in " which it was agreed that he could use the firm " money and secure somebody to apply for sec- " tion 16, township 15-19, from the State for school " lands and pay a consideration to the person for " filing upon it?

"Mr. Bennett: Now, your Honor, we object to " that as immaterial and irrelevant, and not proper " cross-examination except of a defendant on the " witness-stand and as being, if admissible at all, " a part of the Government's direct case.

"The Court: I will overrule that I think it " is competent as bearing upon the question of " knowledge and pre-existing design, system, or " scheme. The jury will understand, though, and

" it is proper at this time to admonish them, the " rule of law is that no matter how guilty a man " might be proven on an offense not the one under " investigation, he could not be convicted except " of the one under investigation. Its only rel- " evancy is as bearing or tending to bear upon the " question of knowledge, intent or pre-existing de- " sign or scheme.

"Mr. BENNETT: And we except to your Honor's " statement to the jury in which there seems to be " an application that these papers and this exam- " ination show or tend to show that the defendant " is guilty of some other crime.

"The COURT: Well, Judge, I don't mean that. " I desire the jury to understand—I mean to carry " no intimation of any kind, character or descrip- " tion. I am passing upon the legal admissibility " of the testimony. I am doing it in order that " the rights of the defendant may be guarded " under the rules of law.

"Q. Now you may answer the question.

"A. I don't remember anything about that trans- " action in general. There might have been some- " thing said about it, but I don't recall it.

"Q. I call your attention to a certified copy of " a letter from Dr. Gesner to M L. Chamberlain, " Salem, Oregon, of date June 23, 1902, inclosing " a check for $80 for payment on the west half " of section —

"Mr. BENNETT: We object to the reading of these " statements.

"Mr. HENEY: Well, I will let you read that letter. " (Hands letter to witness.)

"A. I never saw the letter before.

"Q. Do you remember having any conversation " with Dr. Gesner in June, 1902, in relation to his " having his sister, Mrs. S. M. Jerowe, take up a " portion of that section 16 in township 15-19 for " the firm?

"Mr. BENNETT: This matter all goes in sub- " ject to our objection, without interposing it every " time.

"COURT: I understand all this examination under " this ruling goes in against your objection for " reasons already stated, and the objection is over- " ruled and exception goes to the admission.

"A. I don't remember anything of the kind " having occurred when we were there in June, " when I was there in June."

Tr. of Record, Vol. III, pp. 1091-1094.

Plaintiffs in error complain that the prosecution was permitted to impeach the testimony of the witness Branton upon an immaterial matter. The testimony of Branton was indeed important to the defendants, and it bore every earmark of being perjury. The particular in which it is claimed that the impeachment was on an immaterial matter relates to a statement that he was on his way to

Idaho, at the time he heard Gesner talking to the parties who were then being induced to file upon timber claims. Branton was passing through the country at the time, and had camped one or two days near the ranch of the man named Adams for whom the witness and entryman Campbell Duncan was working at the time. This occurred more than three years before the time of the trial. Branton had not remained in that part of the country, and had only returned there once, to wit: about one year after the filings had been made. Branton went to the timber with Duncan, with the view of taking up a timber claim, if there was sufficient profit in it. After looking over the ground he evidently concluded that the land was not worth much for the timber which was upon it, and unless he was sure that he could sell the land to Gesner and Williamson it was useless to file upon it, even though Gesner furnished the money with which to make final proof. It was natural for him to endeavor to get Gesner to commit himself absolutely to the purchase of the land, because he, Branton, did not know Gesner, and did not live in that section of the country, and had no confidence in Gesner's suggestion that he would purchase the land at a certain price, but could not and would not agree in writing to do so. Branton refused to file because he concluded that there was not sufficient profit in the transaction to pay him for remaining in that vicinity during the period of time

which would be required to publish his notice of intention to make final proof. The profit of $75 would not amount to much after he had paid his living expenses, doing nothing during that period.

No possible harm could have been done by permitting Campbell Duncan to testify in answer to the impeaching question as to whether Branton had not stated that he was on his way to Idaho, because Campbell Duncan had already testified to that fact under cross-examination when the prosecution was presenting its main case. (See Tr. of Record, Vol. III, page 1173.)

Moreover, it was material, under the circumstances, to determine the express intention and purpose of Branton at the time he was camping those few days at the ranch where Campbell Duncan was at work, because his testimony given three years later as to a statement made by Gesner at that time upon which Branton had refused to act at the time must be weighed in the light of the circumstances surrounding the parties at the time. If Branton had remained in that vicinity, or had expected to remain there, he would be much more apt to remember accurately what Gesner had said. Moreover, it was proper to test the memory of the witness in regard to what was said by himself and others, at that time, and it was clearly competent to prove that he was at least mistaken as

to what he himself had stated, in regard to his intentions and his point of destination at the time.

Respectfully submitted,

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